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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,

Plaintiff in Error.

vs.

OCONTO CITY WATER SUPPLY COMPANY,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN REPLY.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

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No. 216.

THE NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
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BRIEF OF PLAINTIFF IN ERROR IN REPLY.

I.

Federal Question.

The rights and title asserted by plaintiff in error were established and accrued under the decree of the federal court of July 27, 1897, reaffirming the decree of that court of July 17, 1895, which readjudged the mechanic's lien and authorized the enforcement and satisfaction of the same by sale of the franchises and property of the Oconto Water Company in accordance with the terms of the decree of October 3, 1892.

These rights and title were denied by defendant in error and by the court below, by refusing to accord to those decrees such effect and such effect only as the same were entitled to. The court below held that the plaintiff in error "never had any lien" and now has no "claim" of any kind against the property, and took no rights or title under the marshal's deed and its con-

firmation by the court. The validity of such lien decrees and the proceedings by the marshal under them "were directly attacked."

Avery vs. Popper, 21 S. Ct. Rep. 94.

Exclusive jurisdiction under such decrees to sell the property, determine all questions of liens and distribution of proceeds of sale, was expressly denied.

Plaintiff in error occupies the same position as Rochereau in *DuPasseur vs. Rochereau*, 21 Wall., 130. Justice Bradley said:

> "Then was Rochereau a subsequent mortgagee to DuPasseur? Was the latter entitled to priority? If so Rochereau would be bound by the judgment though not made a party." (P. 137).

It was held, however, giving the federal proceedings due effect, that Rochereau having the prior title was entitled to the possession of the property unless his debt was paid.

To give due effect to the decrees in question, plaintiff in error is entitled to the rights which accrued to it as a valid prior lienholder, and thus entitled to the possession of the property unless its debt is paid by the defendant in error.

> "Although the claim may not be well founded, the question, nevertheless, was duly raised, and its federal character cannot be disputed. This necessitates the denial of the motion to dismiss."

Blythe vs. Hinckley, 21 Sup. Ct. Rep. 390–392.

II.

Plaintiff in error can recover as it holds title under a prior lien.

Counsel for defendant in error seems to concede that if our lien is senior to the mortgage, the defendant in error must pay our claim on the ground that our lien afforded the "basis for the exercise by the equity court of its jurisdiction to coerce payment." (Brief, p. 13).

This concession is warranted by the case cited, of *Railway Co. vs. Boney*, 117 Ind. 501, on which we relied in the court below as a case in point. Plaintiff in error had a prior, and as valid and binding a lien against the common debtor as Boney had, and is entitled to the relief which the Supreme Court of Indiana gave Boney, in ordering a judgment *in personam* against the reorganized corporation for the amount of the lien and pointing out the course to be pursued in "the exercise by the equity court of its jurisdiction to coerce payment."

In Wisconsin the owner of the legal title to land, though not in possession, may maintain an action in equity against a party claiming under a subsequent lien to set aside a void decree constituting a cloud upon the title and to recover possession of the land.

Kruczinski vs. Neuendorf, 99 Wis., 264.

An action at law in ejectment will not lie to recover an incorporeal hereditament, such as an easement or franchise, by the owner of the legal title thereto, but the action must be in equity.

Racine vs. Cratzenburg, 61 Wis. 481.

Miller vs. State, 77 Wis. 270.

This action being properly brought in equity to acquire possession of the plant and franchise, and to coerce payment of the debt due the plaintiff in error, the priority of its right and title is shown as follows:

Oconto Water Company—common source of title and in possession of property and ordinance from September 15, 1890, to September 29, 1891.

Claim of Title of Plaintiff in Error.	Claim of Title of Defendant in Error.
(1) September 15, 1890. Date of mechanic's lien on equitable title of tangible property of plant. (Record, pp. 19, 37, 47, 49.)	(1) September 18, 1890. First mortgage to Andrews and Whitcomb covering stock, bonds and ordinance rights from city of Oconto. (Record, pp. 16, 23, 44-45, 141.)

(2) January 30, 1891.
Bill in equity filed in federal court to enforce mechanic's lien and for sale of property. (Record, pp. 14, 31.)

(3) October 3, 1892.
Decree recognizing lien on equitable title of tangible property of plant and ordering sale of same, together with the franchise of maintaining and operating plant as an entirety—proceeds of sale to be brought into the registry of the court for distribution among all who should show right thereto, subject to the order of the court. (Record p. 19.)

(4) January 31, 1894.
Legal title to land upon which plant was located, paid for and conveyed to Oconto Water Company. (Record, pp. 22, 31.)

(5) July 29, 1897.
Final decree in United States Court reaffirming decree of July 17, 1895, sequestrating property of Oconto Water Company, ordering proceeds of sale distributed among creditors according to law and in the order of their priority, declaring mechanic's lien prior to first mortgage of Andrews and Whitcomb and paramount to their second mortgage; authorizing enforcement and satisfaction of same by sale of plant and franchise as an entirety, in accordance with the terms of mechanic's lien, decree of October 3, 1892; after applying proceeds of sale in satisfaction of the secured liens, the deficiency, if any, to be ascertained and determined by an order entered at the foot of the decree, and the

(2) March 13, 1891.
Second mortgage to Andrews and Whitcomb covering same property and rights. (Record, pp. 116, 119.)

(3) June 17, 1891.
Suit commenced in state court by Andrews and Whitcomb to enforce lien of the two mortgages, plantiff in error not made a party thereto. (Record, p. 16.)

(4) August 13, 1891.
Judgment by default entered in state court declaring lien on stock, bonds and ordinance rights and ordering sale. (Record, p. 16.)

same to be paid by the defendant Sturdevant; the legal title of the plant then being and to remain in the Oconto Water Company until such company and the receiver thereof should transfer the same by proper instruments of conveyance to the defendant in error, subject, however, to a sale of the franchises and property as an entirety to satisfy the prior mechanic's lien, and without prejudice to any rights of the plaintiff in error to redeem from the mortgage of Andrews and Whitcomb. (Record, 140-6.)

(6) August 28, 1897.
Sale and marshal's deed to plaintiff in error covering (1) legal title, (2) equitable title to property and (3) title to franchise of maintaining and operating plant, confirmed by court. (Record, 18, 20, 31.)

(5) September 29, 1891.
Referee's bill of sale to defendant in error covering stock, bonds and ordinance rights confirmed by state court. (Record, p. 127.)

(6) September 29, 1891.
Possession of entire plant, property and franchises of Oconto Water Company taken by defendant in error.
(Record pp. 97-8.)

III.

Right of Redemption.

Counsel for defendant in error asserts in his brief that "the plaintiff in error had no mechanic's lien in fact" and that therefore "there is no right of redemption." (Page 24).

This question is not involved in the decision of this case unless it be held that the right reserved in the final decree to the plaintiff in error to redeem from the mortgages is cut off by the judgment entered below to the effect that the defendant in error holds the plant "free and clear of any *claim* or lien of the plaintiff." In view of what is said in the opinion of the state supreme court that "respondent is legally in possession of the mortgaged property with at least the rights of mortgagees so circumstanced, it cannot be ousted from

that position without payment of the mortgage indebtedness," thus recognizing the right of the plaintiff in error to redeem, it cannot with consistency be claimed that the court below intended by the terms of the judgment to cut off such right of redemption under the general language that the defendant in error holds the property free and clear of any *claim* of the plaintiff in error. If such, however, would be its effect without discussing the question at length I beg to refer to some authorities bearing upon the question of the right of the plaintiff in error to redeem, should it be held that it is not entitled to the possession of the plant unless it first pays or redeems one or both of the mortgages under which the defendant in error claims title.

The defendant in error presented no such issue by its answer in the court below. Had such a defense been made in the answer it would have been incumbent upon the defendant in error to set forth what it had received in rents and profits while holding and operating the plant, and to offer to surrender possession of the plant upon payment of the amount due on its mortgages, after deducting the net rents and profits derived from the operation of the plant. The plaintiff in error could then have elected to pay the amount so demanded or to have requested an accounting to ascertain the amount, if any remaining to be paid, and upon the payment thereof to become subrogated to the rights of the mortgagees. If Andrews and Whitcomb became the owners of the property by virtue of their purchase at the mortgage foreclosure sale, such ownership was subject to the right of the plaintiff in error to redeem under its mechanic's lien. Except as to this right of redemption there might have been, if the foreclosure judgment and sale had been valid, a complete merger and union of the mortgage interest and the fee. But this merger and union was prevented as to the plaintiff in error so far as it was necessary to preserve its right to redeem and to prevent the extinction of its lien interest as

against such right to redeem. But even as against that right the character of the mortgage interest was changed. The foreclosure and sale, if valid, extinguished the debt so far as it affected the land, and the mortgage interest was no longer a lien held as a mere incident to the debt. Upon redemption the plaintiff in error would be subrogated not to a mere mortgage lien, but to the interest in the land which resulted from the mortgage and its foreclosure if valid. That interest was the entire title subject to the right of subrogation of the plaintiff in error by redemption.

Martin vs. Fridley, 23 Minn., 13.
See Lucking vs. Wesson, 25 Mich., 443.
Renard vs. Brown, 7 Neb., 454-5.
Compton vs. Jesup, (C. C. A. 6th Cir.) 68 Fed. 263-300-332.

Under the terms of the decree of Oct. 3, 1892, of the federal court the defendant in error claiming under the Oconto Water Company by right acquired after September 15, 1890, was in terms barred of its equity of redemption (Record p. 19). Under the judgment of the state court the plaintiff in error was not barred of its right acquired on September 15, 1890, as such judgment purported to vest in the purchaser at the sale only such title as the defendant and any other person claiming under it had obtained "subsequent to the acquirement by the plaintiffs of their rights," to-wit: subsequent to September 18, 1890. (Record p. 123). But defendant in error, or Andrews and Whitcomb its assignors, not having been made parties to the mechanic's lien foreclosure suit would in equity, unless otherwise estopped, be entitled to redeem upon payment of the prior mechanic's lien. Had defendant in error so elected, or the court below so permitted, it could upon amendment by equitable counterclaim set up its right of redemption and upon offering to pay the mechanic's lien be subrogated to the title of the plaintiff in error.

The plaintiff in error with an existing mechanic's lien, valid as against the owner of the property, not having been made a party to the mortgage foreclosure suit in the state court, had and has the right, if necessary to exercise it, although holding a prior lien or title, to pay off and redeem the mortgage in a suit brought for that purpose and asking for an accounting as to the rents and profits received from the mortgagees in possession, with an offer to pay the amount of such mortgage after deducting therefrom when ascertained the amount of the net rents and profits from the operation of the plant.

Farwell vs. Murphy, 9 Wis. 102.
Allen vs. Case, 13 Wis. 621.
See *Clarke vs. Reyburn*, 8 Wall. 318.
C. & V. R. Co. vs. Fosdick, 106 U. S. 47, p. 71.

Such action to redeem will lie in faver of the plaintiff in error, because it was in privity with the Oconto Water Company as mortgagor, that is because it held a valid lien on, or title to the mortgaged premises, or some part of the same as against the mortgagor, although such lien or title be held void or for any reason unenforceable as against the mortgagee or against a purchaser at the mortgage foreclosure sale, having notice of its rights.

See the following authorities:

Rand vs. Cartwright, 1 Ch. Cas. 59.
1 Powell on Mortgages, 261.
1 Robbins' Law of Mortgages, 694.
2 Spence Eq. Juris. 660–669.
Howard vs. Harris, 1 Vern. 190–193.
Tasker vs. Small, 3 My. & Cr. 63.
2 Story Eq. Juris. §1023.
Tiedemann on Real Prop. §334.
1 Herman on Mortgages, §30.
Hodson vs. Treat, 7 Wis. 263.
Green vs. Dixon, 9 Wis. 532.

Bovey Lumber Co. vs. Tucker, 48 Minn. 223.
Turman vs. Bell, 54 Ark. 273.
Beach vs. Cook, 28 N. Y. 508.
Powers vs. Russell, 13 Pick. 69.
Stephenson vs. Edwards, 98 Mo. 623.
Stone vs. Welling, 14 Mich. 514.
Bradley vs. Snyder, 14 Ill. 263.
Compton vs. Jesup, (C. C. A. 6th Cir.) 68 Fed. 263-300.

In *United States vs. Insley*, 150 U. S. 512, reversing the decision of the Circuit Court in 49 Fed. 776, it was held that although a judgment had been entered without any statute authorizing the same, and therefore erroneous, yet the court having jurisdiction of the subject matter and of the parties, its action would be binding and a lien thereby acquired sufficient to support a bill filed by the judgment creditor to redeem from a title obtained by a purchaser under a sale in mortgage foreclosure proceedings, where such judgment creditor was not made a party defendant.

It does not lie in the mouth of the mortgagee, or purchaser with notice, to say, when offered his money on redemption, that as to him the redeeming creditor has no lien or title provided the lien or title is valid as against the common debtor.

See authorities above cited.

IV.

Res adjudicata.

Counsel for defendant in error seems to labor under the impression that the arguments or concessions of counsel and the opinions of the Circuirt Court of Appeals conclusively show what was in issue and what was determined in the creditor's bill suit instead of the final decree which was entered when the cause was reheard

and finally determined in the Circuit Court. The rule is that—

> "In determining what has been adjudged the courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion; where it is free from ambiguity it speaks for itself and cannot be qualified by an opinion by which it may have been preceded."
>
> *1 Herman on Estoppel and Res Adjudicata, p. 471.*
>
> *New Orleans N. Co. vs. New Orleans, 14 Fed., 373.*

Anything in a decision or a decree outside of the issues properly raised in the record is invalid and is treated as a nullity. *Reynolds vs. Stockton*, 140 U. S. p. 266. Any attempt to adjudge a paramount title, free and clear of any adverse claim, either in Andrews and Whitcomb, or in defendant in error would have been beyond the issues made by the pleadings, no such affirmative relief having been sought by cross bill or otherwise as a foundation for such adjudication.

Chapin vs. Walker, 6 Fed. 794.
Brande vs. Gilchrist, 18 Fed. 465.
Armstrong vs. Bank, 37 Fed. 466.
White vs. Bowen, 48 Fed. 186.
Wood vs. Collins, 60 Fed. 139.
Jackson vs. Simmons, (C. C. A. 7th Cir.) 98 Fed. 768.
Washington R. R. Co. vs. Bradley, 10 Wall. 299.
Armstrong vs. Pierson, 5 Iowa, 317.
M'Connell vs. Smith, 23 Ill. 611.

The mandate of the Court of Appeals dated October 5, 1896, ordering that the decree of the Circuit Court be reversed and the cause remanded with instructions to dismiss the appeal for want of equity, was on motion on behalf of defendant in error modified as follows on the 18th day of May, 1897, to-wit: The motion

> "that mandate should direct that provision be made in the decree for the conveyance to appellant

> Oconto Water Supply Company of the legal title to the land holding the pumping station and wells of the water works plant be and the same is hereby overruled, with leave to the court below to make necessary and proper orders for transmission of the legal title to property."

Thereupon the court below was "commanded that such further proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said decree notwithstanding." (Record p. 143).

The mandate so modified therefore gave the requisite authority to the court below to proceed with the cause to a final decree and to dispose of each of the issues under the pleadings in such way as should be according to right and justice and in accordance with its interpretation of such mandate so modified.

Concurrence of four conditions is necessary to *res adjudicata*.

1. Indentity of thing sued for.
2. Identity of cause of action.
3. Identity of persons and parties to the action.
4. Identity of the quality in the person for or against whom the claim is made.

Lyon vs. Mfg. Co., 125 U. S., 698, 700.

The first two conditions are lacking in the case at bar, viz: identity in the thing sued for and identity of cause of action. Whatever questions of fact and of law were determined or remained undetermined by the final decree of July 29, 1897, one thing is certain, that neither the plaintiff in error nor the defendant in error was cut off from the right to redeem the property from the lien of the other. Nor was the question as to which was entitled to possession of the plant determined. Certain it is that the question whether "the mechanic's lien decree took *precedence* of subsequent mortgages was not disposed of by the Court of Appeals," but was left

as the court below determined it to be in the decree of July 17, 1895. There is therefore no basis for the contention of defendant in error that it was adjudged a *paramount* lien upon the property. This will plainly appear from the opinion of Judge Jenkins filed upon the rehearing in the Circuit Court determining what the final decree should be under the mandate of the Circuit Court of Appeals. As suggested upon the oral argument, the opinion is here printed in full as follows:

"MEMORANDA FOR COUNSEL.

Jenkins, J. Upon the motions presented to the court upon the filing of the mandates of the Court of Appeals, this court has reached a conclusion with respect to the proper decree to be entered.

"*First.* That the decree of this court, of July 17th, 1895, do stand as entered, except that said decree be set aside, pursuant to the mandate of the Court of Appeals, as to the defendants S. D. Andrews, W. H. Whitcomb, Oconto City Water Supply Company and the City of Oconto, and that as to such defendants the bill be dismissed for want of equity, with costs in favor of the said defendants.

"*Second.* That as to all the other defendants, except the Oconto Water Company and George W. Sturtevant, Jr., the said bill be dismissed for want of service of process, but without costs.

"*Third.* That the decree to be entered should provide for the conveyance by the Oconto Water Company to the Oconto City Water Supply Company of the legal title to the land upon which the pumping station and wells of the water works plant are located.

"*Fourth.* That such decree should also provide for the restoration and surrender by the clerk of the court of the bonds taken from Andrews and Whitcomb by the court and deposited by them with the clerk, under the order of the court; but this without adjudging the

validity of the bonds and being merely a provision for the restoration to Andrews and Whitcomb, of that which by the determination of the Court of Appeals had been erroneously taken from them.

"*Fifth.* That the complainants are entitled to a decree against George W. Sturtevant, Jr., for the full amount of the stock transferred to him by Garland, there having been no payment upon the subscription to such stock.

"*Sixth.* The order of March 5, 1894, restraining the marshal from proceeding to sell under the mechanic's lien decree, was superseded by the fifth clause of the decree of July 17th, 1895. There would seem to be no necessity for further order in respect thereto. If the contention of the complainant that the mechanic's lien decree took precedence of subsequent mortgages was not disposed of by the Court of Appeals, it should be placed in a position to be able to redeem from the sale under the mortgages to Andrews and Whitcomb. If that contention was disposed of by the Court of Appeals, a sale under the mechanic's lien decree can do no harm to Andrews and Whitcomb or their successor in interest, beyond possibly creating a cloud upon their title. The court would not, however, permit this to be done if it was clear from the several opinions of the Court of Appeals that the contention in that respect had been determined.

"I cannot spell out from the opinions of that court that the precise contention had been considered and determined, unless it must be held to have been so determined by the fact of the reversal of the decree of this court and the dismissal of the bill for want of equity as against Andrews and Whitcomb and their successor in interest.

"A decree may be prepared in accordance with these suggestions."

If defendant in error had been aggrieved by the final decree as entered and had thought that the Circuit

Court had misconstrued the mandate of the Court of Appeals or had failed to give full and correct force thereto or had not granted to it affirmative relief or all the relief possible under the issues made by the pleadings, or had failed to adjudge all that had been considered in the opinions filed by Judge Woods, its remedy was by mandamus or appeal. It is too late now to complain of, or ask unwarranted rights under such final decree.

In re Sandford F. & T. Co., 160 U. S., 247.

V.

The decision by the Supreme Court of Wisconsin of the case submitted of *Pittsburgh Testing Laboratory vs. Milwaukee Electric Railway & Light Company*, while it may not affect the question of *res adjudicata* will doubtless throw some light upon the principal contention of counsel for defendant in error that "the plaintiff *never* had any lien. Such is the settled law of this State and the judgment in the case in the federal court is proof conclusive on the question."

Counsel seems to contend that the doctrine of *Hill vs. Railroad Company*, 11 Wis., 223, was not overruled by *Chapman Valve Co. vs. Oconto Water Co.*, 89 Wis., 264, but that the latter case was decided upon some question not already decided in the *Hill* and *Purtell* cases. Although the opionion in the *Chapman Valve* case did not in express terms state that the *Hill* case was overruled, yet such was the effect of the decision and this was formally announced in the later case of *C. & N. W. Ry. Co. vs. Forest Co.*, 95 Wis., 80–90. Upon this question Judge Jenkins said in speaking of the *Chapman Valve* case:

> "This decision reverses the former holdings of that court referred to in the opinion of this court reported in 52 Fed. 43, and in conformity to which holdings that decision was made." (68 Fed. 1008).

The opinion, therefore, in the *Pittsburgh Testing Laboratory* case when filed may be of some value in determining whether the mechanic's lien statute of Wisconsin did give a lien to the plaintiff in error under its contract to furnish material for the construction of the plant of the *Oconto Water Company*.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

Milwaukee, Wis., March 29, 1901.

No. 33.

Sup. Ct. Bff. of Noyes for Pl.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. ~~316~~ 33

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

Supplemental Brief containing Opinion Supreme Court of Wisconsin in Pittsburg Testing Laboratory v. Railway & Light Co.

GEO. H. NOYES,
Counsel for Plaintiff in Error.

EVE. WIS. CO., MIL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 216.

NATIONAL FOUNDRY AND PIPE WORKS, LIMITED,
Plaintiff in Error,

vs.

OCONTO CITY WATER SUPPLY COMPANY,
Defendant in Error.

As suggested upon the argument of this cause, the opinion of the Supreme Court of Wisconsin in the case of *Pittsburg Testing Laboratory vs. Milwaukee Electric Railway & Light Company*, filed June 27, 1901, is here printed. The action was begun March 13, 1900. The following are the substantial allegations of the complaint which the Court holds entitles the plaintiff to a mechanic's lien:

"The said defendant The Milwaukee Electric Railway and Light Company is and was at all the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, located at the City of Milwaukee, in said state, authorized to engage and engaged in the business of operating in said city a system of street railways and an electric light and power plant; that the said defendant sells electric light and power produced at such plant and has a contract with the City of Milwaukee for lighting certain streets in said city, which said contract was entered into on the 15th day of December, 1895, and by the terms thereof, expires upon the 15th day of December, 1900, and that the said defendant is now engaged in carrying out and completing said contract by means of its plant and appliances, other than the new power house hereinafter mentioned.

Plaintiff further shows that the said defendant company has long prior to entering upon the construction of such new power house constructed power houses in various parts of said city and placed therein proper engines, boilers and machinery and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the said last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric light and power plants of the defendant corporation as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its said contract with said City of Milwaukee until the expiration thereof.

That the said defendant corporation is contemplating extensions and additions to its said system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the said defendant corporation in the year 1898 caused plans and specifications to be prepared and made therefor by one H. J. Esser, an architect of the City of Milwaukee.

That prior to the 6th day of February, 1899, the defendant co-partners were employed by and entered into a contract with the said defendant corporation to perform work and labor and to furnish materials according to said plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the said defendant corporation, and situated on the land hereinafter specifically described. * * *

That such new power house stands and is situated upon the following described land, to-wit: Lots numbered eight (8) and nine (9) in block number forty-seven (47), in the Seventh Ward in the City and County of Milwaukee, Wisconsin; that said defendant company at the time of making said contract with said defendant co-partners was and ever since has been and now is the owner of said land and of the said new power house building situated thereon; that the above described land does not exceed one acre in extent and is within the limits of an incorporated city; * * *

Wherefore, the plaintiff demands judgment that the amount of its said lien be ascertained and adjudged; that the interest of the defendant corporation in the said lands hereinbefore described at the time of the commencement by the plaintiff of work under its said contract with the said defendant co-partners, to-wit., February 6th, 1899, or the interest therein which the said defendant corporation or any person claiming under it has since acquired, be sold to satisfy the amount of the plaintiff's lien so ascertained and adjudged and that the plaintiff have the costs of this action and such other and further relief as may be equitable."

OPINION.

"CASSODAY, C. J.: This is an appeal from an order sustaining a demurrer to the complaint to enforce a sub-contractor's lien upon the premises described. The complaint, after alleging that during the times therein mentioned the plaintiff was a corporation located at Pittsburg, Pa., and that the defendant, The Milwaukee Electric Railway and Light Company, was a corporation located at Milwaukee, and organized to engage and engaged in the business of operating in the City of Milwaukee a system of street railways and an electric light and power plant, and that the defendants Warren and John Roberts were co-partners engaged in the business of civil engineers and contractors, alleges, in effect, that the electric company sells electric light and power produced at such plant, and has a contract with the City of Milwaukee for lighting certain streets therein, which contract was entered into December 15, 1895, and by its terms expires December 15, 1900; that the electric company is now engaged in carrying out and completing such contract by means of its plant and appliances *'other than the new power house hereinafter mentioned'*; that the electric company had long prior to entering upon the construction of such new power house, constructed power houses in various parts of the city and placed therein proper engines, boilers and machinery, and has ever since operated and used and is now operating and using the same for the purpose of producing electricity; that the last named power houses and appliances therein contained are amply sufficient for the purpose of supplying with electricity and operating the system of street railways and electric

light and power plants of the electric company as they have been heretofore and now are constructed and carried on and sufficient to enable it to carry out and fulfill its contract with the city until the expiration thereof; that the electric company is contemplating extensions and additions to its system of street railways and to its lighting and power plants; that to operate such systems and plants when so increased and extended as contemplated, a new power house is necessary; that for the purpose of constructing such new power house the electric company in 1898 caused plans and specifications to be prepared and made therefor by an architect of the city; that prior to February 6, 1899, Warren Roberts & Co. were employed by and entered into a contarct with the electric company to perform work and labor and to furnish materials according to plans and specifications in and about the erection and construction of a brick building to be used as such new power house, owned by the electric company and situated on the land hereinafter specifically described; that in and by such contract it was provided that all the structural material used and employed in the construction of such building should be tested and inspected by this plaintiff at the expense of Warren Roberts & Co.; that prior to February 6, 1899, the plaintiff was employed as sub-contractor by Warren Roberts & Co., under their contract with the electric company, to test and inspect such structural material; that as such sub-contractor, under such employment, the plaintiff performed work and labor for Warren Roberts & Co., between February 6, 1899, and August 19, 1899, that is to say, inspected and tested the structural material used and employed by Warren Roberts & Co. in the construction of such building under and pursuant to the provisions of the plans and specifications aforesaid; that the exhibits attached, contain a true and correct statement of the work, tests and inspections thus performed by the plaintiff, showing the amount of work done and the prices therefor; that such prices were the prices agreed upon between the plaintiff and Warren Roberts & Co., for the doing of such work; that all of such work and labor was done and performed upon structural material which was sold and furnished to be used and which was actually used by Warren Roberts & Co., in the construction and erection of such new power house; that such new power house stands and is situated upon two lots therein described; that the

electric company at the time of making such contract with Warren Roberts & Co., was and ever since has been and now is the owner of the land and of the new power house building situated thereon; that the same does not exceed one acre in extent and is within the limits of the city; that the last date of the performance of such labor of this plaintiff was August 19, 1899; that September 20, 1899, this plaintiff gave to the electric company the notice of its claim for a lien and statement thereof, of which true copies are hereto attached; that October 13, 1899, this plaintiff gave to the electric company the notice and statement of the work, tests and inspections, of which true copies are hereto attached; that November 29, 1899, this plaintiff duly filed, as required by law, its claim for lien for the amount due and owing to it from Warren Roberts & Co., in the office of the clerk of the Circuit Court of Milwaukee County, a copy of which claim for lien is hereto attached; that such claims and all the allegations thereof are true and are hereby made a part of this complaint; that one year has not elapsed between the doing of such work and labor and the commencement of this action; that there is now due and owing to the plaintiff from Warren Roberts & Co., by reason of such claim, $777.29, and interest thereon from August 19, 1899. Wherefore, the plaintiff demands judgment that the amount of its lien be ascertained and adjudged and enforced against such premises, with costs.

The question presented is whether the facts stated are sufficient to entitle the plaintiff to a sub-contractor's lien upon the premises described under the statutes of this state for the work and labor performed. (Secs. 1775, 1775a, 3314, 3315, R. S.) The statutes declare, in general terms, in effect, that the party performing such work and labor shall have a lien upon such building and the interest of the owner thereof, therein, upon complying with the provisions of such statutes. (Id.) It is virtually conceded that the facts alleged would entitle the plaintiff to such lien, if the premises were owned by a private party and used for private purposes. But it is claimed, and the trial court manifestly held, that such statutes are not applicable to property of a *quasi* public corporation engaged in operating a system of street railways and an electric light and power plant in the City of Milwaukee. In support of such claim counsel rely upon certain decisions of this Court; and

counsel for the plaintiff rely upon certain other decisions of this Court in support of its claim for a lien herein. We shall not here undertake to harmonize or reconcile all of such decisions—much less all that has been said in the different opinions in support of such decisions; but we will attempt to decide this case in accordance with the principles of law applicable to the facts stated. The early case of *Hill vs. The La Crosse and Milwaukee R. R. Co.*, 11 Wis., 214, 221, was an action to enforce a mechanic's lien for building a part of a brick block which, had it been completed according to the contract, would have extended 'along the whole front of the block, upon the street—being 420 feet and to the depth of 55 feet—and constituted the defendant's depot in Milwaukee.' The 'judgment was recovered by default, and was entered for a lien upon the interest of the company in the whole block 41.' On the application of the company for a modification of the judgment it was made to appear, 'that the railroad track was laid across the east part of the block between the buildings and the river—that the whole block was not necessary or convenient for the use of the buildings erected which were designed for stores and offices'; and thereupon the Court modified the judgment 'so as to confine the lien to the west 60 feet of the particular lots on which the building as far as erected actually stood.' On the appeal by the plaintiff from such modified judgment, the same was reversed by this Court, which held that the plaintiff was entitled to a lien upon one acre in the block; and that as the block exceeded an acre it was necessary for the Court to determine to what portion of the block the lien extended; and so this Court came to the conclusion, 'that the lien of the appellants was equivalent to a mortgage by the company of an acre in the block, and that it should be adjudged to cover the south one acre of the block, extending from the river to the street, and that it should be so sold as to leave what remained to the company in a compact form, extending also from the river to the street.' The Court reached that conclusion expressly because the premises were 'at the very end of the road, and where, from the very nature of the premises, it would be more convenient to both parties,' that they should be so divided, in order that each party should 'have access both to the river and the street.' As the land was situated at the very end of the railway tracks, the lien could be thus enforced without de-

stroying any of the corporate franchises of the company. The enforcement of the lien could at most only result in acquiring some of the property of the corporation not essential to the enjoyment of such corporate franchises. Upon that ground the decision may be sustained, although the reasoning of the opinion may not in all respects be approved. The learned justice who wrote the opinion, in a note to the case, states that some of such reasoning was inapplicable. The decision seems to have gone largely upon the ground of the superior equity. Two years after that decision a mechanic's lien, in favor of a sub-contractor, was enforced by this Court against the depot of a railroad company and a certain amount of land upon which it was situated, seemingly without reference to or consideration of, the question whether the corporate franchises of the company were thereby destroyed or impaired. *Carney vs. The La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503, 509. At the same term of the court it was held that a municipal corporation was not liable to garnishment in an attachment suit. *Burnham vs. the City of Fond du Lac*, 15 Wis., 193. That case was followed in *Buffham vs. the City of Racine*, 26 Wis., 449; and *Merrill vs. Campbell*, 49 Wis., 535. Upon the principle involved in those cases, it was subsequently held by this Court that the lien of a sub-contractor, under the statute, did not extend to machinery furnished by him and placed in a building constituting a part of the water works of a city. *Wilkinson vs. Hoffman*, 61 Wis., 637. This was not put upon the ground that the general language of the statute (Sec. 3314) was not broad enough to authorize such lien, but on the grounds of public policy and because the objects of municipal government forbid that the clause of the statute referred to should be held applicable to machinery placed in a building constituting a part of the city water works; that it stood upon the same ground as where material is furnished for a county court house, jail, public school building or other public building which are held to be exempt from the operation of mechanic's lien laws; and that upon the grounds of public necessity and convenience it was held that the lien did not attach. That case has been repeatedly approved by this Court. The *City of Platteville vs. Bell*, 66 Wis., 326, 334; *Chapman Valve Manufacturing Co. vs. Oconto Water Co.*, 89 Wis., 264-271; *Strike vs. Wisconsin O. F. M. L. Ins. Co.*, 95 Wis., 586. A promi-

nent author states that: 'On the grounds of public policy the mechanic's lien laws do not, in the absence of express provisions, apply to public buildings erected by states, counties and towns, for public use.' 1 *Jones on Liens*, 2d Ed., Sec. 1375, citing many adjudications from numerous states. In support of the proposition see *Leonard vs. City of Brooklyn*, 71 N. Y., 498; *Board of Commissioners vs. O'Connor*, 86 Ind., 531. The same rule is there stated as applying to school houses and water works so erected for public use. The 'public policy' mentioned, seems to be nothing more than an enforcement of the old common law rule, as stated by Savage, C. J., that: 'When a statute is general, and any prerogative, right, title or interest would be divested or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him.' *The People vs. Herkimer*, 4 Cowen, 348. In an earlier case in the same state it was said, that: 'In a representative government where the people do not and cannot legally act in a body where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent. * * * On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty it was equally important to be preserved.' *The People vs. Gilbert*, 18 Johnson, 229. The rule thus stated by Chief Justice Savage was, at an early day, expressly sanctioned by the Supreme Court of the United States, and then added that: 'The doctrine that the government should not, unless named, be bound by an act of limitations, is in accordance with that just cited from Bacon, because if bound, it would be barred of a right; and, in all such cases, is not to be construed to be embraced unless named, or what would be equivalent unless the language is such as to show clearly that such was the intent of the act. * * * The real ground is a great principle of public policy which belongs alike to all governments, that the public interest should not be prejudiced by the negligence of public officers, to whose care they are confided.' *U. S. vs. Knight*, 14 Peters, 315. See also *Savings Bank vs. U. S.*, 19 Wall., 239; *U .S. vs. Herron*, 20 Wall., 263. As stated in one of these cases, the same principle has been decided in several of the states; and all upon the same ground. In some of the cases it is held, that the statutes of limitation do not run against

the state unless expressly declared. *The People vs. Gilbert, supra; Commonwealth vs. Hutchinson,* 10 Pa. St., 466. In other cases the rule has been applied to the discharge of bankrupts or insolvents. In the administration of government the municipality is the agency of the state. The question recurs whether the rule applicable to municipalities applies also to *quasi* public corporations. Upon that question there seems to be a diversity of opinion. 1 *Jones on Liens,* Secs. 1378, 1618 et seq. There can be no question in this state but what electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. They both have the right of eminent domain. Sec. 13, Art. I., Con.; Secs. 1845-1863a, Stat., 1898. Such being the relationship between the corporation and the public, the Supreme Court of the United States has held, that: 'Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges or other property of a railroad company that *may be essential in the operation and maintenance of its road for the public purposes* for which it was established.' *Buncombe County Commissioners vs. Tommey,* 115 U. S., 122. In that case Mr. Justice Harlan, speaking for the whole court, said, in effect, that 'a different construction of the statute would enable parties having liens' for small amounts, 'to destroy a public highway, and defeat the important objects which the state intended to subserve by its construction. No such intention should be imputed to the legislature, unless the words of the statute clearly require it to be done.' Id., page 129. Thus it has been held in Pennsylvania that 'the results to be produced to the public by public corporations' for building bridges, turnpikes, railroads and the like, 'cannot be disturbed by the seizure by creditors of any part of the property *essential to their active operations.*' *Foster vs. Fowler,* 60 Pa. St., 27. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking and accommo-

date the public. (Id.) Such rules were applied in that case to a corporation for introducing water into a town for the accommodation of its inhabitants. (Id.) The principle involved in that case was approved in a later case, in the same court, 'where a mechanic's lien was sustained on the ground that the public was not directly interested in the business of the defendant corporation.' *Girard Storage Co. vs. Southwork Co.*, 105 Pa. St., 248; and also see *Guest vs. Water Co.*, 142 Pa. St., 610, 615; *Reynolds vs. Reynolds Lumber Co.*, 169 Pa. St., 626. On the other hand it has been held in the same state that: 'Lands purchased by a railroad company beyond what are actually dedicated to corporate purposes, are bound by the lien of judgments against the corporation, and are liable to be levied in execution and sold by the sheriff, as are the lands of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how acquired by the corporation.' *Plymouth R. R. Co. vs. Calwell*, 39 Pa. St., 337. And yet in the same case, Woodward, J., speaking for the court, said: 'Though the corporation in respect to its capital, is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be *balked*, therefore, by either the act of the company itself or of its creditors. For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation.' (Page 339.) See also *Oakland Railway Co. vs. Kernan*, 56 Pa. St., 203. The rule of construction, mentioned, and some of the adjudications cited in support of it, have repeatedly been sanctioned or recognized by this court. *The Yellow River Improvement Co. vs. Wood County*, 81 Wis., 560-2; S. C., 17 L. R. A., 92, and note; *The Fond du Lac Water Co. vs. the City of Fond du Lac*, 82 Wis., 322, 329; *Chapman Valve Manufacturing Co. vs. Oconto Water Co.*, 89 Wis., 264; *C., M. & St. P. R. Co. vs. City of Milwaukee*, 89 Wis., 506; the *State ex rel. Milwaukee Street R. Co. vs. Anderson*, 90 Wis., 550; *Wright vs. The Milwaukee Electric Ry. and Light Co.*, 95 Wis., 29; *C. & N. W. Ry. Co. vs. Forest Co.*, 95 Wis., 80, 89; the *State ex rel. Badger Ill. Co. vs. Anderson*, 97 Wis., 114. In a recent case Mr. Justice Marshall said: 'Much confusion often happens from a failure to distinguish

between those franchises that are corporate in a strict legal sense, and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation.' The *State ex rel. Atty. Gen. vs. Portage City Water Co.*, 107 Wis., 446; S. C., 83 N. W., 699. The rule to be deduced from the best considered cases, seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes. But that under the general language of such statutes a lien may be enforced against such structures and property of the corporation as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In addition to the authorities cited, see *National Foundry and Pipe Works vs. Oconto Water Co.*, 52 Fed., 43; S. C., 68 Fed., 1006; 2 *Jones on Liens*, 2d Ed., Secs. 1618, 1619; 3 *Elliott on R. R.*, Secs., 1066-1075. In one of these sections Mr. Elliott says: 'The courts will not presume that the legislature intended to subject the public to the annoyance and inconveniences which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required.' Id., Sec. 1066. The distinction between the cases where liens cannot be enforced against a particular structure or section of a railway, essential in its operation and maintenance for the public purposes for which it was established, and the cases where the lien may be enforced against a particular structure belonging to such corporation, but not so essential to its operation and maintenance, and hence which may be taken from the corporation without destroying or impairing its corporate franchises, have not always been observed in this court. The question is not whether the legislature may, in its wisdom, authorize the enforcement of such lien in any case, but whether the general language of our statute shall be so construed as to authorize a *pro tanto* destruction of the corporate functions, created as an entirety and primarily for the benefit of the public. In other words, courts are not authorized, in the construction of such general language, to repeal *pro tanto*

the charter of a corporation so created primarily for the public benefit, especially in violation of a well-established rule of construction of such general statutes so far as public rights are concerned. Such rule was not observed in *Carney vs. The La Crosse and Milwaukee R. R. Co.*, 15 Wis., 503, and the more recent case of *Purtell vs. Chicago Forge and Bolt Co.*, 74 Wis., 132. In the case at bar it is admitted that the defendant was engaged in carrying out and completing its contract with the city by means of its plant and appliances, *'other than the new power house'* in question. In other words, it is admitted that the new power house, against which the lien is sought to be enforced, was not essential to the operation and maintenance of the defendant's system of street railways, and an electric light and power plant for the public purposes for which the defendant corporation was established. It follows from what has been said, that the plaintiff is entitled to such lien.

By the Court: The order of the Circuit Court is reversed and the cause is remanded with directions to overrule the demurrer and for further proceedings according to law."

It is respectfully submitted that this opinion in effect overrules *Chapman Valve Mfg. Co. vs. Oconto Water Company*, 89 Wis., 264, and reasserts the doctrine of *Hill vs. R. R. Co.*, 11 Wis., 214. It approves the principles of law substantially as laid down by Judge Jenkins, and embodied in the mechanic's lien decree, in *National Foundry and Pipe Works, Limited, vs. Oconto Water Company*, 52 Fed., 43 (7 C. C. A., 603).

It holds that a mechanic's lien will lie against the whole or a part of the property of a *quasi* public corporation under the statutes of Wisconsin in certain cases, and in certain cases that it will not. The determination of any action brought for the purpose of enforcing such lien depends upon a question of fact and not of law. The lien will lie if its enforcement will not work a destruction of the "corporate franchises" or "corporate functions created as an entirety and primarily for the benefit of the public."

The logical result of this latest expression of opinion of the Supreme Court of Wisconsin is that if the plant as an entirety, including its franchise to operate, is not to be dismembered but is to pass without destruction or impairment to the purchaser at the sale so that the public will not be injured, the court in decreeing the enforcement of the lien against the property does

not "repeal *pro tanto* the charter of a corporation so created primarily for the public benefit," and in such a case the statute gives a mechanic's lien.

It also follows that if the part of the plant against which the lien is sought "may be replaced and is not indispensable" (115 U. S. page 135) *to the operation and maintenance of the plant as operated and maintained at the time of the commencement of the work of construction on such part,* a lien will lie against it although such new structure is essential, and is built, to operate the plant when completed or enlarged in accordance with the designs of the corporation, and although the enforcement of the lien by judicial sale in the suit after the plant is so completed or enlarged may result in the dismemberment of the plant, unless the decree for the sale provides that all the property with the franchises of operating the same be sold as an entirety.

It must be conclusively presumed that the mechanic's lien by virtue of which the plaintiff in error claims its title was authorized by the statutes of Wisconsin, and that the decree of the federal court recognizing and enforcing it must be given its full legal force and effect.

Milwaukee, Wis., July 6, 1901.

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